IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

ESTATE DUTY REFERENCE No 2 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

BHARTIBEN S JHAVERI

Versus

CONTROLLER OF ESTATE DUTY

Appearance:
MR D.A. MEHTA WITH MR. R.K. PATEL for Petitioner
MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

Date of decision: 24/12/98

ORAL JUDGEMENT

1. At the instance of the applicant accountable person, in the matter of Late Shri S.P.Jhaveri, who died on 18.9.1980, two questions of law arising out of Estate Duty Appeal No. 5/Ahd/82, in the proceedings under the Estate Duty Act, have been referred to this court by the Income Tax Appellate Tribunal along with statement of the case:

"1.Whether, on the facts and in the circumstances of the case, the E.D. authorities were justified in including the value of the half share ofthe deceased in the coparcenary properties after rejecting the claim of the Accountable Person that half of such half share could be includible?

2. Whether, on the facts and in the circumstances of the case, the E.D. authorities were justified in holding that M/s. Ashvin Mehta & Co. had goodwill and the deceased's share in such goodwill had passed on his death?"

2. QUESTION NO.1.

The relevant facts for Question 1 are that the deceased and his brother Shri J.B. Jhaveri were carrying on the legal profession in the name and style of M/s. Ashwin Mehta & Co. The deceased along with his brother had interest in the coparcenary property of Hindu Undivided Family. The deceased died issueless leaving behind his widow. In the coparcenary property of which the deceased and his brother J.B.Jhaveri were coparcenaries, deceased had one half share. The accountable person of the deceased claimed that only fifty per cent of the one half share of the deceased in coparcenary can be considered for the purpose of determining the principal value of the estate that passed to his heirs. The contention was founded on the basis that deceased a male Hindu having left the female heir of class I in schedule to Section 8 of Hindu Succession Act, Section 6 of the Hindu Succession Act would operate and it is only to the extent deceased would have been entitled to a share in the coparcenary property by assuming that a partition had taken place immediately before his death will be the interest of the deceased in coparcenary that would pass on to accountable persons. As the wife would have got one half share in the coparcenary interest of her husband, had such partition taken place, deceased had only 50% of half share in the coparcenary property, the other half belonging to the brother of the deceased.

3. The contention did not find favour with the Assistant Controller of Estate Duty and it included full value of the half share of the deceased in coparcenary properties in the principal value of the estate of the deceased. Contention as to deductions to be made on account of charge of maintenance of widow in the property was accepted. The Tribunal affirmed the order of the Assistant Controller of Estate Duty disallowing the assessee's claim to exclude the alleged share which the widow claimed to have in the coparcenary interest of her husband , had the partition taken place during her husband's life time, by holding that widow was not entitled to claim or have a share out of the share which the deceased would have been allotted on the partition of

the coparcenary properties between himself and his brother.

4. Learned counsel for the accountable person has vehemently urged that in view of the provisions of Section 6 read with 14 of the Hindu Succession Act 1955 it must be held that the interest of the deceased in the property of Mitakshara coparcenary of which he was member devolved in accordance with the provisions of Section 6 by way of succession read with Section 8 of the said Act. The Explanation 1 to Section 6 of the Act of 1955 envisages that for determining the interest of Hindu Mitakshara coparcenary, it should be deemed that partition of the property has taken place immediately before expiry of the deceased, irrespective of whether he was entitled to claim partition or not that is to say entitlement to claim partition is not the criteria but allotment of share on such partition, taking place is the relevant criteria and as a widow has a right in her husband's interest on such partition in the absence of other coparceners to share in the property she must be held to have share equal to her husband.

5. Having carefully considered this contention we are unable to sustain it. It is true that deceased a male Hindu having died after commencement of Hindu Succession Act and he having a female heir of class I of the schedule, his interest in coparcenary property devolved by succession and not on the surviving coparceners by survivorship. But the provision does not affect the rule of partition and the extent of share to which a member of coparcenary or a female though not a member of coparcenary is entitled to on such partition taking place. From the facts found by the Tribunal it is apparent that at the time of death deceased had no issue. He was member of the coparcenary which constituted of himself and his brother. His brother was not an heir in presence of his widow, a relative enumerated in class I of the schedule. It is not also in dispute that as far as brother inter se is concerned on partition deceased and his brother would have one half share each. This takes us to the question as to what is status of a female member of joint family vis-a-vis coparcenary, on partition of ancestral property.

6. Firstly a coparcenary is a much narrower body than a Hindu Undivided Family. Coparcenary consists of such male members only who get interest in ancestral property, which is also termed as coparcenary or unobstructed heritage, by birth; and no male who is removed by four generation in male line of descent from

the last holder, or any female in any circumstance, though may be members of Hindu Undivided Family, can be member of coparcenary. Thus a wife, unmarried daughter, daughter in law, or other female relative by marriage or by birth in male line of descent and unmarried, though are members of Hindu Undivided Family but are not members of coparcenary and do not have any interest in the property of Hindu Undivided family by birth. However, in certain circumstances some of the female members are entitled to be allotted a share in the property of Hindu Undivided Family when a partition takes place amongst coparceners. Thus for the purpose of partition there must exist two or more coparceners amongst whom partition can take place. A sole surviving coparcener becomes an absolute owner of the property, no one else having right to claim partition or have a share in coparcenary property in his hands. Para 217 of Mulla's Hindu Law it has been stated that no female can be a coparcener under the Mitakshara law. Even a wife though she is entitled to maintenance out of her husband's property and has to that extent an interest in his property is not her husband coparcener. Nor is a mother a coparcener with her sons nor a mother in law with her daughter-in law. Therefore in the first instance one must conclude that female is not a coparcener and she does not have by herself a right to claim partition ordinarily, except in case when some interest in coparcenary property passes on to her by way of succession to a male deceased and she claims right to that. It is also well settled that some of the female relatives who are heirs of deceased male are entitled to allotment of a share, if the partition takes place. The only females relatives who are entitled to a share in coparcenary property when partition takes place are described in paras 315 to 317 of the aforesaid treatise. They are wife, widow, widowed mother, and grant mother. All these female members of the family in relation to respective relations have no unqualified right to get share in partition, but in certain circumstance, such females have a right and are entitled to a share if a partition takes place between other members of coparcenary. With respect to each one of them law has been stated to be thus:

7. In relation to wife it has been stated in para 315 that a wife herself cannot demand a partition but if a partition does take place between her husband and his sons she is entitled to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband. About widowed mother, law has been stated in para 316. A mother cannot compel a partition so long as the sons remain united. But if a partition

takes place between the sons of her husband she is entitled to a share equal to that of a son in the coparcenary property. So also the position has been stated in respect of grand mother in para 317. A paternal grandmother (father's mother) cannot herself demand a partition but when a partition takes place between her sons sons or between her sons and son's sons of another predeceased son, she is entitled to a share equal to that of a son's in the coparcenaries property and she is also entitled to a similar share on partition between the sons and th purchaser of the interest of one or more of them.

8. Thus according to the law of partition as is applicable to coparcenary property a female in the absence of her son, or sons' son, is not entitled to claim or to the allotment of a share solely against her husband if he is a sole surviving coparcener, so far as the branch headed by her husband is concerned. As a matter of fact, the sole surviving coparcener enjoys the absolute proprietary rights over the property of HUF. When a partition takes place between the respective brothers each brother takes their own share in their own right qua their family consisting of himself and his descendants. In the present case a partition is deemed to have taken place between the deceased and his brother immediately before the death of the deceased. It would consequently result into a position that the deceased on getting his share in coparcenary interest by severance from his brother became sole surviving coparcener qua his interest in the coparcenary and no one else had a right to claim partition nor the property was amenable to partition Therefore the question of entitlement or allotment of a share on a deemed partition with his wife would not arise in the case of sole survivor coparcener for further determining the interest of deceased in the coparcenary that is deemed to pass on to the accountable person by succession. His entire property including ancestral property will pass on to his heirs. Position would have been different, had the deceased had a male lineal descendant, with whom he would have to partition to determine his interest at the time of death. In that event of such deemed partition between the deceased and his son, widow too would have got share equal to that of her son.

9. Therefore it must be held that though in the absence of other relations of Class I in the schedule, widow may be sole surviving heir entitled to succeed to the entire estate of the deceased, if he died intestate, because of her presence only the interest of deceased in

coparcenary which shall devolved on her by succession will not diminish. Entire interest of the deceased in coparcenary will be part of the estate passing on the death of such person.

We answer Question No.1 referred to us in affirmative that is to say in favour of the revenue and against the assessee.

10. Question No.2 gives rise to a vexed issue whether a firm of professionals can at all have a good will. It has been contended by learned counsel for the accountable person that as the firm in question of which deceased was partner was discharging the professional services which were personal in character and dependent on the personal skill of the person concerned, there cannot be any good will of the firm and if at all there can be any good will it cannot have any saleable value. Such a wide proposition does not appear to be sound.

11. It needs to be considered in the first instance what is meant by good will. It was said by Lord McNaghten in Commr. of Inland Revenue v. Muller & Co. Margarine Ltd. (1901) AC 217:

> "What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start. The good will of a business must emanate from a particular centre or source"

12. Lord Lindley dealing with the concept of goodwill in his treatise on Partnership said:

> "It is generally used to denote the benefit arising from connection and reputation, and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its goodwill may have a marketable value, whether the business is that of a professional man or of any other person, but whether or not the good will has a saleable value is a question of fact to be determined in each cases"

13. The Supreme Court in Rustam Cavasjee Cooper AIR

1970 SC 564 observed:

> "Good will of a business is an intangible asset, it is whole advantage of the reputation and connections formed with the customers together with the circumstances making the connection durable. It is that component of the total value of the undertaking, which is attributable to the ability of the concern to earn profits over a course of years or in excess of normal amounts because of its reputation, location and other features, Traso v. Hunt 1896 AC 7. Good will of an undertaking therefore is the value of the attraction to customers arising from the name, and reputation for skill, integrity, efficient business management, or efficient service."

14. The aforesaid principle broadly speaking connects the goodwill with the advantage of the reputation and a connection formed with the customers together with circumstances which makes such connections durable, that brings into existence the goodwill of a particular trade, business or calling. That is to say, if because ofthe reputation and connection formed with the customers together with circumstances, denotes to the fact that such connection is of durable nature and is referrable to the name of the firm of which professionals are partners, irrespective of the name of partners, it may construe goodwill of the firm, independent of the professional skill of the partners individually. On the other hand it may happen that such reputation or connection of durable nature are connected with the name of the person and not with the trade, business or the firm in the name of which trade or profession is carried on, it may become a personal reputation not saleable or passable to any other person whether by sale or by succession.

15. If we look in that light one cannot but come to conclusion that the question cannot be answered in abstract, that a firm of professional can never have a goodwill or always have a goodwill as an asset which is saleable for value. To illustrate in Arundell v. Bell 52 LJ Ch. 537 it was held that good will of solicitors business has no value, yet in Burchell v. Wilde, (1900) 1 Ch. 551, the court assumed that the solicitors business has a good will.

16. In C.J.Thakar (A.P) v. C.E.D. 214 ITR 323 a Division Bench of Bombay High Court in the facts and circumstances of the case found that where the firm of which deceased was partner was dissolved on the death of

the deceased partner and a new firm was constituted, a new name of the firm was given not in way connected with the deceased. The history would indicate that the firm never had any fixed trade name. The name of the firm always changed with joining and retirement of a partner, there was no express agreement between the partners about any asset of the firm capable of being sold or valued as goodwill of the firm. There were no special features like a location of the office premisses in an important locality etc. The court found that the firm of professionals in the case before it had no goodwill. The question had arisen under the Estate Duty Act on the death of a partner in a firm of advocates.

17. Quite contrary in Vindoor Bai v. Controller of Estate Duty (1981) 20 CTR (All) 175, when the court found that one of the 12 partners of a firm of contractors, the partners being engineers had died and the firm continued in the same name as it was before the death of the deceased partner and there was much growth in the income during three years figures of which were placed before the assessing authorities came to the conclusion that the firm had good will which was also saleable in the market. It was stated -

> "Goodwill is acquired during the course of a number of years of business. It rarely springs from the very institution of the firm. To say that the goodwill of the firm is an asset of the firm is a far cry from holding that every firm has a goodwill. There are some firms which depend solely on the professional skill of a particular partner, which may have no goodwill at all.... So it cannot be said as a matter of law that a firm of contractors and engineers has no goodwill."

18. We are in respectful agreement with this principle. Once we reach this conclusion it must depend on facts and circumstances of each case whether firm partners of which are professionals has or has not good will and must be determined in each case as a question of fact. If the firm has acquired a reputation in its name, which is of some durability to attract customers as a matter of course irrespective of the name of persons manning it, the firm may have a good will. On the other hand if it is a case as was before the Bombay High court, in C.J.Thakar's (Ap) case, where the attraction to the calling depended solely on the name of the person and not on the name of firm and firm name changed in tune with the name of the partner who were currently manning it,

the firm of professionals may not have any good will.

19. Viewed in this light, when we find that the name of the firm does not reflect in any manner, the name of persons who were partners at the time when Mr. Jhaveribhai dies, the only other partner was also not connected in any way with the name of the firm which had acquired considerable reputation as found by the Tribunal, referring to firm's income shown in returns. We do not see any reason to take a different view, about the existence of goodwill of the firm.

As a result of the aforesaid discussion, we answer the question No.2 also in affirmative that is to say in favour of revenue and against the assessee.

There shall be no order as to costs.

(Rajesh Balia,J)

(A.R. Dave, J)